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Supreme Court, U.S.
FILED
JUL 18 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1586

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD MALLEY

and

THE STATE OF RHODE ISLAND,

Petitioners,

v.

JAMES R. BRIGGS and LOUISA BRIGGS,

Respondents.

ON WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS,
FIRST CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF THE PETITIONERS

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. Ann M. Sheadel, Assistant Attorney General, State of Rhode Island, Counsel for Petitioners, and John S. Foley, Esq., Counsel for Respondents. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* sixty-one times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The *International Association of Chiefs of Police, Inc.* (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The *Legal Foundation of America* (LFA) is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

Amici well know the problems faced by police officers in their good faith attempts to conform their conduct to the requirements of the Fourth Amendment and to avoid possible civil liability for themselves and their agencies. The state of this intricate complex of rules compels these organizations to speak on behalf of law enforcement officers in this case.

ARGUMENT

I.

THE DECISION OF THE COURT BELOW IMPOSES A CONSTITUTIONALLY AND SOCIALLY UNWARRANTED BURDEN UPON POLICE OFFICERS TO BE THE ULTIMATE JUDGE OF THE SUFFICIENCY OF LEGAL PROCESSES THEY ARE SWORN TO SERVE; AND IT ALSO VIOLATES THIS COURT'S RULING IN HARLOW V. FITZGERALD

Americans for Effective Law Enforcement has been privileged to file many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the *International Association of Chiefs of Police,* various state associations of chiefs of police, and the *Legal Foundation of America.* Those briefs have presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid rather than unduly hinder effective law enforcement, and without impinging upon basic constitutional protections. In the present brief, we will not undertake an extended analysis of the case law, but will confine our brief to the law enforcement impact of the issues raised by the parties.

Amici recognize that the practical impact of the ruling of the court below, *Briggs, v. Malley,* 748 F.2d 715 (1st Cir. 1984), is that even if a warrant is issued by a neutral and detached magistrate or judge who has made a probable cause determination, the officer can still be civilly liable for serving such process if it is later determined by a trial or appellate court that probable cause was lacking. It is our contention that this novel rule puts the police officer in an impossible position in our criminal justice system, one that was never contemplated by the architects of our constitutional and political system, and it violates the proper division of functions identified in *Baker v. McCollan,* 443 U.S. 137 (1979) for police officers and magistrates.

In *Gerstein v. Pugh,* 420 U.S. 103 (1975) this Court defined that division in a manner *amici* believe is both constitutionally accurate and reflective of the practical realities of our criminal justice system. It stated unequivocally, 420 U.S. at 112-13, that the role of the police is to investigate crime, and the role of the magistrate is to neutrally and in a detached manner determine the existence or non-existence of probable cause and to issue or refuse to issue warrants; moreover, this Court specifically recognized that such roles are *separate, distinct,* and *mutually* exclusive.

This division of functions was further emphasized in *U.S. v. Leon,* ____ U.S. ____, 104 S.Ct 3405 (1984), where the Court stated clearly that a police officer acting in good faith, i.e., free of the taint of falsity or misrepresentation, could rely upon the process issued by a neutral and detached magistrate and could serve such process, and its fruits would be admissible in spite of a subsequent judicial determination that the magistrate was mistaken in his or her probable cause finding.

This constitutionally required division of roles and responsibilities for police officers and magistrates is inextricably linked, as this Court has stated, to the Fourth Amendment's preference for warrants. As noted in *Johnson v. U.S.,* 333 U.S. 10 (1948) at 14, n.3:

> [T]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. (quoting from *U.S. v. Lefkowitz,* 285 U.S. 452, 464 (1932)).

Amici recognize this linkage, and the preference sought to be protected thereby. When we as *amici* have argued for the

establishment of carefully defined exceptions to the warrant requirement, as in *Terry v. Ohio,* 392 U.S. 1 (1968) and *U.S. v. Ross,* 456 U.S. 798 (1982), we have done so *only* on the basis of compelling countervailing interests—such as protection of the life of police officers and the need to avoid the destruction of evidence due to the uniquely mobile character of its situs.

Here there is no compelling basis for the novel blurring of roles mandated by the court below and its unavoidable damage to the warrant preference. We respectfully submit to this Court, *based upon our collective experience* as law enforcement executives, administrators and public interest representatives, that the ruling of the court below may encourage some police officers to forgo obtaining warrants in some cases as they realize that they themselves have been enshrined as the final arbiter of probable cause prior to the initiation of formal criminal proceedings. This is a power that *amici* have no desire to see *even suggested or implied* as appropriate; yet it is the logical outcome of the ruling below and will be so perceived by some police officers acting in good faith. Moreover, law enforcement officers cannot reasonably be expected to perform the intricate balancing of Fourth Amendment interests and provision of civil remedies undertaken by the court below.

If the decision of the lower court is affirmed, law enforcement officers must then accurately assess the existence of probable cause *before* approaching the magistrate for a warrant, or else they face the possibility of personal civil liability under 42 U.S.C. § 1983. Mere issuance of the warrant by a neutral and detached magistrate will not insulate the officer from liability, as it would under traditional tort principles. See *Allison v. County of Ventura,* 68 Cal. App.3d 689, 137 Cal.Rptr. 542 (1977); *Nelson v. City of Las Vegas,* 99 Nev. 548, 665 P.2d 1141 (1983); *Bender v. City of Seattle,* 99 Wash.2d 582, 664 P.2d 492 (1983); *Restatement (Second) of Torts* § 41, Comment (a) 1977). Nor will the absence of falsity, misrepresentation or recklessness on the part of the officer.

Under this contorted reversal of roles imported by the decision below, where lies the incentive for the officer to utilize the magistrate at all? Of what benefit to the officer—criminally or civilly—will the magistrate be, at least in those cases arguably fitting one of the warrant exceptions? *Amici* submit that some officers, *acting in perfect good faith,* will be inclined on occasion to forego the time and effort to assemble affidavits and applications for warrants and present them to a magistrate. This will defeat the warrant preference so carefully put into place and nurtured by nearly two hundred years of Fourth Amendment jurisprudence and the intent of the Framers.

The position of the officer who proceeds to obtain a warrant may be even more precarious. When issuing the warrant, the magistrate is, in effect, issuing judicial process with an attendant order to the officer that such judicial process be served in accordance with law. *E.g.,* Cal. Penal Code (West, 1970 & 1983 Suppl.), § 836; Ill. Code of Criminal Procedure, Ill. Rev. Stat. ch. 38 (1981), § 107-2. The Illinois statute, for example, states that, "The warrant of arrest shall: . . . (6) Command that the person against whom the Complaint was made be arrested and brought before the court issuing the warrant or if he is absent or unable to act before the nearest or most accessible court in the same county . . ." What happens if the officer is suddenly seized with doubts about the sufficiency of the warrant?

What is he to do? Refuse to serve the warrant? Return it to the magistrate with the statement that the magistrate is wrong in his assessment of probable cause? Place the warrant in a desk drawer and conveniently forget it? Consult the prosecutor for a "second opinion," possibly a "third opinion" if the prosecutor initially reviewed and approved the application? The decision of the Court below presents the hapless officer with a bizarre set of choices, nonetheless real. Some of these choices are clearly inappropriate. Some may subject the officer to contempt of court for refusal to obey an order of the court. Some may

subject him to internal discipline for neglect of duty and failure to carry out a facially legal order. See Legal Aspects of Discipline by Police Administrators (Northwestern Traffic Institute, Evanston, Ill.) 3rd Ed., 1984. Not a single one of these choices—including referral back to the magistrate or the prosecutor—can *guarantee* the officer freedom from § 1983 liability under the rule of the court below. Once again, we ask where is the incentive to consult the magistrate at all in this type of "Catch-22" setting?

It is no answer to these questions to suggest that the ruling of the Court below might not apply to "grey areas" in which a police officer supposedly would not be expected to know that issuance of the warrant is in error. See, *e.g., Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Mitchell v. Forsyth,* ____ U.S. ____, 105 S.Ct. ____ (June 19, 1985). *Amici* have seen many "grey areas" in the law of Fourth Amendment jurisprudence become established proscriptions or established exceptions by virtue of subsequent caselaw developments. We do not propose that police officers be required to endlessly refine their appreciation of "grey areas" in the law as it relates to ultimate § 1983 liability. Indeed, the preference of this Court has been to establish "bright lines" for officers to follow in Fourth Amendment settings, see *New York v. Belton,* 453 U.S. 454 (1981) and *U.S. v. Ross, supra,* and we thoroughly subscribe to that process. Implementation of the ruling below runs counter to the ultimate impact of that process and makes the police officer the final arbiter at the pre-trial stage of what is a "grey area" for § 1983 liability. It gives the officer a power properly exercised only by the magistrate and the prosecutor. We do not believe this is a structurally appropriate role for the officer, in addition to running counter to the constitution and social determinations made by the legislature.

Harlow and related cases provide, in effect, a good faith defense to a police officer for conduct not clearly violative of a § 1983 plaintiff's constitutional rights. In the instant case the

conduct complained of was the submission to a magistrate by the police officer of his application for an arrest warrant. But submission of facts to an impartial and detached magistrate is conduct that *fully comports* with the Fourth Amendment and should *always* establish a good faith defense, in the absence of fraud, misrepresentation or other impropriety by the police officer. There is no better or more effective means devisable to protect individual rights than to submit facts to an impartial magistrate in a case not falling into one of the established exceptions to the warrant requirement. As this Court noted in *U.S. v. Leon,* ____ U.S. ____, 104 S.Ct. 3405, 3421 (1984), "Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest . . ." *Amici* support the adoption of a good faith exception to the exclusionary rule in warrantless arrest and search cases, but for those cases where a warrant is required, preferred or otherwise sought, the officer's conduct should be protected by the good faith defense in § 1983 actions if he has been free of falsity, misrepresentation and recklessness.

Amici submit that negligence as a basis for affixing § 1983 liability upon a police officer is inappropriate where the officer has followed the constitutionally prescribed procedure of relying upon a magistrate to make a probable cause determination. If this Court is concerned that such a holding may leave a § 1983 plaintiff without a cause of action for constitutional error in the probable cause determination because of the absolute immunity enjoyed by the magistrate under *Pierson v. Ray,* 386 U.S. 547 (1967)—which was apparently a concern of the court below—the remedy may be reexamination of the policies underlying judicial immunity, not in extension of personal liability to the police officer for conduct fully comporting with the Constitution.

CONCLUSION

Amici respectfully submit that the ruling of the court below is unwarranted under prior holdings of this Court, violates the constitutional delineation of the appropriate roles of police and magistrates, offends the Fourth Amendment warrant preference, and constitutes unwise judicial policy-making. It should be reversed by this Court with a clear statement to police officers that their good faith adherence to the warrant process will not be attended by the assessment of damages under 42 U.S.C. § 1983.

Respectfully submitted,

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